United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

76-7452

United States Court of Appeals

[redacted]

BRIEF FOR PLAINTIFFS-APPELLEES

[redacted]

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Statutes and Rules

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket No. 76 - 7452

GERTRUDE J. BONIME and LILLIAN OLDEN,

Plaintiffs-Appellees,

-against-

JOHN C. DOYLE, WILLIAM M. WISMER and CANADIAN JAVELIN LIMITED,

Defendants-Appellees,

-against-

SAMUEL H, SLOAN,

Objector-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR PLAINTIFFS-APPELLEES

PRELIMINARY STATEMENT

This is an appeal by Samuel H. Sloan, an objector, from an Order and Final Judgment of Honorable Morris E. Lasker, United States District Judge, entered August 9, 1976 (A300-306)*,

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* All references to the Joint Appendix are abbreviated "A" and followed by the page number. All references to the Supplemental Appendix are abbreviated "SA" and followed by the page number.

approving the settlement of this stockholders' class action as fair, adequate and reasonable. Said Order and Final Judgment was entered pursuant to the decision of the District Court, dated June 30, 1976, which is reported at 416 F. Supp. 1372 (S.D.N.Y. 1976).

ISSUES PRESENTED

1. Should this Court consider the issues sought to be raised by appellant, which he failed to raise in the court below?

2. Has appellant demonstrated that the court below committed an abuse of discretion in approving the Settlement herein as fair, adequate and reasonable?

3. Did the court below commit an abuse of discretion in determining that the instant action was maintainable as a class action under Rule 23 of the Federal Rules of Civil Procedure and that plaintiffs were proper class representatives?

4. Does the "Notice of a Class Action Determination, of a Proposed Class Action Settlement and Hearing Thereon and Requirements for Filing Proofs of Claim" sent to class members with the approval of the court below meet the requirements of Rule 23 of the Federal Rules of Civil Procedure and due process of law?

5. Was the provision in the Order and Final Judgment barring and enjoining the institution and prosecution of any direct or representative action arising out of the matters alleged in the Amended Complaint proper?

6. Was the provision in the Order and Final Judgment which reserved jurisdiction over the effectuation and administration of the settlement (including the determination of disputed claims and an allowance or attorneys fees for plaintiffs' counsel) proper?

STATEMENT OF THE CASE

A. The Nature Of The Action And The Pleadings

This action was commenced on December 3, 1973, as a class action by plaintiff Gertrude J. Bonime against defendants Canadian Javelin Ltd. ("Javelin") and its principal officers, John C. Doyle, a director and Chairman of the Executive Committee, and William M. Wismer, a director and President. The action was brought on behalf of all purchasers of Javelin stock similarly situated during the period of wrongful conduct alleged. Lillian Olden was added as a plaintiff on December 11, 1974 (A 101).

The Amended Complaint (SA 28) alleges in substance that defendants disseminated false and misleading statements

in violation of Section 10b of the Securities Exchange Act of 1934 as amended (the "Act"), Rule 10b-5 promulgated thereunder, Sections 17 and 5 of the Securities Act of 1933 and the common law and that these false and misleading statements resulted in the artificial inflation of the market price of Javelin stock. Plaintiffs sought damages for themselves and the class as a result of having purchased Javelin stock which was worth substantially less than the price paid by them.

The events covered in the Amended Complaint involve two important projects of Javelin. It is alleged that Javelin, a Canadian corporation, was engaged in a project started in 1968 to build and develop facilities for the manufacture of linerboard, a wood product, in the province of Newfoundland, Canada (hereinafter the "Linerboard Project"). Subsequently, it became heavily involved in a project to discover and exploit mineral resources in the Cerro Colorado area and other areas of Panama (hereinafter the "Panama Project").

The Amended Complaint alleges in substance that commencing in 1969 Javelin issued public reports that indicated that Linerboard production would commence in 1971 and that the linerboard mill complex would be the largest and most up-to-date in the world. These optimistic statements were allegedly false and misleading because Javelin failed to reveal the true size

of the project, its anticipated profit, the feasibility, the true quality and quantity of production, the true cost, the fact that the actual cost was exceeding cost projections, the extent of financing required by the project, the extent of governmental financial support, the disposition of the funds received, obstacles encountered in obtaining financing and certain serious disputes between Javelin and the Newfoundland government. In May 1972, the Newfoundland government took over the Linerboard Project.

In connection with the government takeover of the Linerboard Project, defendants reported in April 1973 a $4.3 million current asset, which represented the amount claimed by Javelin to be due from the government. Javelin allegedly failed to reveal that the government did not acknowledge the claim and that Javelin had not taken the necessary steps to establish the claim, such as instituting an arbitration proceeding. As a result, Javelin's working capital was grossly inflated.

The Amended Complaint further alleged that Javelin publicly misrepresented the situation with respect to its Panama Project. Specifically, it is alleged that it represented that it had a right to exploit an alleged large copper discovery in the Cerro Colorado area of Panama when in fact such right was highly speculative, that it had made commercial feasibility

studies when in fact no final commercial feasibility study exists, that it had made financial arrangements to begin mining and production and had an agreement to sell the entire initial output when in fact Javelin was still in the process of negotiating the sale of the output of the project.

B. The Prior Proceedings Herein

In their pleadings, defendants denied the class action allegations as well as the material allegations of wrongful conduct, and asserted affirmative defenses, including lack of jurisdiction and failure to state a claim for relief.

The pretrial discovery relating to the issues raised in the pleadings was extensive. Many thousands of pages of documentary materials were produced by Javelin and reviewed and analyzed by plaintiffs' counsel. In addition, plaintiffs' counsel conducted depositions of four persons who were key figures in the two projects of Javelin. Plaintiffs' counsel also received extensive answers to lengthy and detailed interrogatories (A 99-103).

Following the examination of documents, plaintiffs moved in January, 1975 for class action certification, seeking a class of all purchasers of Javelin stock during the period from April 30, 1969, the date of the first allegedly misleading statement, to October 25, 1973, the date trading in Javelin

stock was suspended by the American Stock Exchange (A 84-91). During the period of suspension, Javelin issued various press releases as well as its 1973 Annual Report which fully disclosed the status of its affairs, including the two projects. Defendants did not oppose the motion for class certification but reserved their right, as permitted by Rule 23(c) of the Federal Rules of Civil Procedure, to later seek modification or vacation of class certification. On the basis of the showing made in plaintiffs moving papers that a class action was maintainable the District Court certified the class sought on February 10, 1975 (SA 4). The sending of Notice was deferred, since discovery was expected to be completed expeditiously and such discovery might affect the parameters of the class(id.).

The pretrial discovery in this case showed that there were serious questions of plaintiffs' ability to prevail on the merits and the extent of the possible damages that could be proved even if plaintiffs were successful upon a trial. The information revealed by pretrial discovery and an evaluation of the merits and possible damages was fully explored in the affidavit of Benedict Wolf, plaintiffs' counsel, which was submitted to the Court in support of the settlement (A 95-133).

In the opinion of plaintiffs' counsel, there was a fairly good possibility of success on the claim that Javelin had not fully revealed the risk that it might not receive an

exploitation agreement in the Cerro Colorado Project, and the indefinite nature of the marketing arrangements. However, there was serious doubt with respect to plaintiffs' chances of prevailing with regard to the other claims concerning the Cerro Colorado Project and their claims regarding the Linerboard Project, although these claims were not deemed to be completely without merit.*

On the issue of damages, the evidence indicated that Javelin's problems with the Linerboard project had been fully aired in the newspapers during the political controversies surrounding the project. Therefore it was arguable that the price of Javelin stock generally reflected the material information, even though this was not disclosed by Javelin. Indeed the price of Javelin stock actually traded higher on the first day of trading after a suspension following disclosure by Javelin in a letter to its stockholders of its problems with the government. The possible damages during the period covered by the Cerro Colorado Project, based on releases starting in June, 1973, seemed more substantial in view of the fact that Javelin stock rose sharply and trading was heavy.

Defendants continued to deny all wrongdoing and asserted that they had sound legal defenses based on their

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* Plaintiffs did not believe there was a chance of success on the alleged Section 5 violation based upon the sale of unregistered stock, since Javelin had not sold unregistered stock during the period covered by the Statute of Limitations.

exercise of business judgment and good faith. Moreover, they asserted that provable damages for the entire class period were no greater than $2,500,000 and supported their view with the opinion of their expert, Dr. Rogert F. Murray, S. Colt Sloan Professor of Banking and Finance at the Graduate School of Business, Columbia University, who gave testimony at the hearing before the Court and submitted an affidavit in connection therewith.

On July 9, 1975, a settlement of the action was reached after considerable hard arms-length bargaining. The settlement, as embodied in a Stipulation of Settlement dated July 9, 1975, provided in substance for $1,350,000 to be paid into a settlement fund by defendants, two-thirds to be allocated to the claims of persons who purchased during the period of the Panama Project and one-third to be allocated to the claims of persons who purchased during the period of the Linerboard Project. The payment of this sum was to be made by the defendants in such proportions as they agreed among themselves. The allocation of the fund between the two classes was based upon plaintiffs' counsel's view of the strengths of the claims of each class, the difficulties of showing damages and the extent of potential damages.

The Stipulation of Settlement also provided a formula for determining the loss of each class member for purposes of

distributing the settlement. The formula, in essence, computes the loss as the difference between the purchase price and the greater of either the selling price or the price on the first day of trading after full disclosure of material information by Javelin with respect to the Linerboard Project or the Cerro Colorado Project (A 19).

The Stipulation of Settlement set forth procedures for the review of Proofs of Claim and accorded to claimants a right to a court hearing to determine the validity of their claims should any such claim be rejected by any party (A 26-27).

C. The "Notice Of A Class Action Determination, Of A Proposed Class Action Settlement And Hearing Thereon, And Requirements For Filing Proofs of Claim Dated July 19, 1975 (Hereinafter the "Notice")" (A 137-145)

The Notice was sent in August, 1975 to all members of the class by mail and was published in three newspapers of wide circulation in the United States and Canada (A 135-136).

The Notice described the class and informed the class members of the nature of the action and proceedings, gave a brief summary of the terms of the settlement as set forth in the Stipulation of Settlement and notified the class that there would be a hearing to be held October 17, 1975 to determine whether the proposed settlement should be approved by the Court as fair, reasonable and adequate and whether the action

should be dismissed on the merits with prejudice. The class members were also informed that they had the right to "opt out" of the class and the settlement on or before October 7, 1975, and the right to object to the settlement on or before September 29, 1975. They were further informed that, if they did not elect to be excluded, they could enter an appearance through their own counsel.

The facts that defendants would pay the settlement in cash* and that the fund would be distributed, one-third to the claimants in the first class period, April 30, 1969 to May 31, 1972, and two-thirds to the claimants in the second class period, June 1, 1972 to October 24, 1973, were also set forth. Members of the class were informed of the necessity of filing a proof of claim in the form annexed to the Notice by January 16, 1976 in order to participate in the settlement. They were informed that, if they did not file a claim or opt out, they would be barred from any recovery on the claims asserted herein. They were advised that the Stipulation of Settlement set forth the method of review of Proofs of Claim, with final determination in cases of disputed claims to be made by the Court or by a Master appointed by the Court.

The Notice also informed the class of the amount that would be sought by the plaintiffs' attorneys as counsel fees if

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* The Stipulation of Settlement had given the defendant the option to pay partly in cash and partly in stock or warrants or all in cash (A 18).

the settlement were approved and that the fees and expenses determined by the Court would be paid out of the settlement fund, except that expenses of administration in consummating the settlement would be borne by Javelin.

Finally, the Notice concluded by stating that the references to the pleadings, settlement agreement and documents were only summaries, and advised that reference should be made to the texts that are on file with the Clerk of the United States District Court for the Southern District of New York for a complete description of their terms, conditions and provisions.

D. The Hearing On The Settlement And The Decision Of The District Court To Approve The Settlement

Out of the large number of class members who received notice, only eleven objected to the settlement in writing or orally at the hearing. By far the most active objectors were Fay and Haskell Lurie (hereinafter "the Luries"), who were plaintiffs in two actions pending in the Illinois federal and state courts based on grounds similar to the instant action.* The proponents of the settlement submitted lengthy and detailed affidavits. At the hearing, Dr. Murray was produced by defendants, and cross-examined by counsel for the Luries. No expert witness was produced by any objector to refute Dr. Murray, although written material on the question of damages was submitted by counsel for the Luries. After the hearing, voluminous

* As objectors, they were joined by one Sylvia Einstein, and reference to the Luries thereafter will include her.

affidavits, briefs and other data were furnished to the Court by the proponents and by the attorneys for the Luries.

The appellant filed a Notice of Appearance dated August 20, 1975, in which he stated that he would appear at the hearing and urge that the settlement be disapproved and that the class action not be maintained and the complaint dismissed (A 58). He did not show up at the hearing.*

On June 30, 1976, Judge Lasker rendered an opinion overruling the objections to the settlement and approving the settlement. He dealt at length with the difficulties with respect to the merits of the claims herein and the complex problems in determining the probable damages. Judge Lasker concluded that the analysis of Dr. Murray, which attempted to factor out the gross losses of investors from those that arguably could have been caused by the alleged misrepresentations, provided a "creditable basis for arriving at an estimated range of potential recovery."** The Court held that the settlement was "within the 'zone of reasonableness' in view of what we know

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* After filing his objection prior to the October 17, 1975 Court hearing, appellant did not seek to become involved in the later proceedings and showed no further interest in the matter until after the court approval of the settlement and entry of the Order and Final Judgment, he asked for additional time to file his appeal. (See affidavit of Benedict Wolf, sworn to January 13, 1977, submitted in opposition to appellant's motion for leave to file his brief and supplemental appendix herein.)

** For reasons similar to those discussed by Judge Lasker in the portion of his opinion that rejected a "gross loss" approach, appellant's argument about the need to tabulate the gross losses as reflected in the Proofs of Claim is clearly unfounded.

about the merits of the case, the potential recovery and the consequent risks and complexities of proceeding on through trial" (SA 16). He therefore overruled the Luries' objections and those of the other objectors and approved the settlement.

Following the June 30, 1976 decision, the District Court entered an Order and Final Judgment (A 300-306), which provides, in pertinent part, that:

> "1. Due and adequate notice of the class action determination, the proposed settlement, and the hearing and full opportunity to be heard have been given.
>
> "2. The Settlement Stipulation is hereby approved and is adjudged to be fair, adequate and reasonable.
>
> "3. The defendants are adjudged to be jointly and severally liable to pay $1,350,000 into a settlement fund (the 'Fund') as required by said Settlement Stipulation.
>
> * * *
>
> "8. This action shall be dismissed on the merits, with prejudice and without costs as to the defendants."

In paragraphs 9 and 11 of the Order and Final Judgment, the District Court retained jurisdiction with respect to the administration and effectuation of the proper distribution of the Fund and the allowance to plaintiffs' attorneys of reasonable counsel fees and disbursements incurred in connection with this action.

The Luries filed a Notice of Appeal from the Court's decision and subsequently withdrew their Notice of Appeal. Guardian Management, S.A., a claimant who did not object to the settlement in the court below, also filed an Appeal which was thereafter withdrawn.

SUMMARY OF ARGUMENT

Since appellant failed in the court below to raise the issues on which he bases this appeal (although he had ample time and opportunity to do so), he should not be permitted to raise such issues for the first time in this Court. In any event, appellant has failed to show that the District Court abused its discretion in approving the settlement herein or in determining that the action was maintainable as a class action. The Notice sent to class members clearly meets the requirements of Rule 23 of the Federal Rules of Civil Procedure and due process of law. The provisions in the Order and Final Judgment barring the institution and prosecution of any direct and representative action arising out of the matters alleged herein, and reserving jurisdiction over the effectuation and administration of the settlement (including the determination of disputed Proofs of Claim and for the allowance of attorneys' fees for plaintiffs' counsel) were proper.

ARGUMENT

POINT ONE

THE APPELLANT SHOULD NOT BE PERMITTED TO RAISE FOR THE FIRST TIME IN THIS COURT OBJECTIONS TO THE FAIRNESS OF THE SETTLEMENT AND PROCEDURAL OBJECTIONS WHICH HE DID NOT RAISE IN THE COURT BELOW

On this appeal, appellant has abandoned the objections he urged upon the court below (A 58-71) and which were rejected by that court. He now questions for the first time the procedures which were followed and challenges the fairness of the settlement.

This Court has repeatedly refused to entertain on appeal issues which were not raised in the court below, unless the issues were purely questions of law and a refusal to consider them would result in a miscarriage of justice. See Palmer v. Reconstruction Finance Corporation, 164 F.2d 466 (2d Cir. 1947); U.S. v. Vater, 259 F.2d 667 (2d Cir. 1958); U.S. v. Indiviglio, 352 F.2d 276 (2d Cir. 1965); Green v. Brown, 398 F.2d 1006 (2d Cir. 1968); see also American Surety Company of New York v. Coblentz, 381 F.2d, 185, 189 fn. 5 (5th Cir. 1967).

Appellants' contentions that the settlement is inadequate and that the Notice and settlement procedures were improper should have been voiced in the District Court so that

Court could at least have had an opportunity to consider them and decide whether to adopt or reject them.

Appellant could easily have raised in the lower court all the questions he now seeks to raise on appeal since he had ample time and opportunity to do so from the time of the hearing on October 17, 1975 to court approval of the settlement on June 30, 1976. Under these circumstances, as in U.S. v. Vater, supra, appellant's failure to raise these contentions in the Court below was more than merely a "careless failure to claim a point" or "inadvertence" 259 F.2d at 672. We submit that there is no reason to alter the general rule which prevents such new issues from being raised on this appeal. Cf. Grunin v. International House of Pancakes, 513 F.2d 114, 122-123 (8th Cir. 1975). Nevertheless, plaintiffs-appellees desire to present to this Court the basis for their assertion that there is no merit to appellant's arguments.

POINT TWO

THE ORDER AND FINAL JUDGMENT APPROVING THE SETTLEMENT HEREIN SHOULD BE AFFIRMED ABSENT A CLEAR SHOWING THAT THE COURT BELOW WAS GUILTY OF AN ABUSE OF DISCRETION

It is well settled that an Order of a District Court approving a settlement of a stockholder's class action should not be disturbed unless there is a clear showing that the District

Court was guilty of an abuse of discretion. City of Detroit v. Grinnell Corporation, 495 F.2d 448 (2d Cir. 1974); State of West Virginia v. Chas. Pfizer & Co., 440 F.2d 1079 (2d Cir. 1971); cert. denied sub. nom; Cotler Drugs, Inc. v. Chas. Pfizer & Co., 404 U.S. 871 (1971).

The Third Circuit set forth the reasons for this principle in the following terms:

> "Great weight is accorded his [the District Judge's] views because he is exposed to the litigants, and their strategies, positions and proofs. He is aware of the expense and possible legal bars to success. Simply stated, he is on the firing line and can evaluate the action accordingly." Ace Heating & Plumbing Co., Inc. v. Crane Co., 453 F.2d 30, 34 (3d Cir. 1971).

The foregoing statement was quoted with approval by this Court in City of Detroit v. Grinnell Corporation, supra, at page 454.

In Voltmann v. United Fruit Co., 147 F.2d 514, 517 (2d Cir. 1945), this Court discussed what would constitute an abuse of discretion and concluded that, if the lower court's decision "is not shown to have been arbitrary or capricious...," there could be no finding of abuse of discretion.

Recently, in Patterson v. Newspaper & Mail Del. U. of N.Y. & Vic., 514 F.2d 767 (2d Cir. 1975), this Court

stated that it would not "substitute our ideas of fairness for those of the District Judge in the absence of evidence that he acted arbitrarily or failed to satisfy himself that the settlement agreement was equitable..." (514 F.2d at 771) (emphasis added).

POINT THREE

THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN APPROVING THE SETTLEMENT HEREIN AS FAIR AND REASONABLE

When the foregoing principles are applied to the case at bar, it becomes clear that there is no basis for a reversal of the judgment of the District Court. The District Court held a hearing and inquired in great depth into the merits of the case, the potential recovery and the risks and complexities of proceeding through trial. Voluminous post hearing briefs and papers were submitted. The opinion of the District Court demonstrates that, in determining to approve the settlement, it was fully aware of its responsibilities and the legal criteria to be applied in deciding whether to approve the settlement herein. Surely the statements of this Court in City of Detroit v. Grinnell Corporation, supra, affirming the approval of a class action settlement, that "evaluation of a proposed settlement requires an amalgam of delicate balancing, gross approximations and rough justice" and that "the District Court has given us much more in this case", are equally appropriate to this case.

Although appellant now claims, for the first time, that the settlement should not have been approved as fair, adequate and reasonable, he devotes only about one-half page of his brief to a discussion of this important issue (Appellant's Br., p. 34). He does not present a scrap of evidence to show that the possible recoverable damages or the merits of the plaintiffs' claims are other than as described in the comprehensive and detailed affidavit of Benedict Wolf submitted in support of the settlement (A 95-134). In short, there is absolutely nothing of probative value offered by the appellant on which it is possible to base a conclusion that District Judge Lasker abused his discretion in approving the settlement, and that his decision should be reversed.

The only other ground on which appellant attacks the settlement is one dealing with propriety rather than fairness and relates to the alleged formation of a tentative class solely for purpose of settlement.

The short answer is that, as Judge Lasker noted, no such tentative class exists in this case. The class action motion was made and was granted by the District Court well before settlement was reached and would have remained in effect unless revoked by the Court, regardless of whether there was a settlement of the action. Judge Lasker did comment that "there is arguably some similarity to tentative class procedure" (416 F. Supp. at 1380), but, as he indicated, even if there were any basis for

analogizing to a tentative class, the procedure in this case meets the test laid down by this Court in City of Detroit v. Grinnell Corporation, supra. In the Grinnell case, this Court makes clear that use of the tentative class procedure does not automatically result in a conclusion that the settlement reached was unfair or inadequate. Here, as in Grinnell, supra, where the approval of the settlement by the District Court was affirmed by this Court, there was a hearing at which all persons affected by the settlement had an opportunity to appear and challenge the class determination and the fairness of the settlement. Likewise, as in Grinnell, supra, substantial discovery had been conducted and there was a substantial basis for the conclusion that the settlement was fair and reasonable and not the product of collusion or inadequate representation.

We respectfully submit that there is no merit to appellant's challenge to either the fairness of the settlement or its procedural aspects.

POINT FOUR

THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN DETERMINING THAT THE ACTION WAS MAINTAINABLE AS A CLASS ACTION UNDER RULE 23 OF THE FEDERAL RULES OF CIVIL PROCEDURE AND THAT PLAINTIFFS WERE PROPER CLASS REPRESENTATIVES.

It is well recognized that a District Court has broad discretion in determining whether a class action should

be maintained and that an appellate court, upon review, should not disturb the District Court's determination unless there has been abuse of such discretion. City of New York v. International Pipe & Ceramics Corp., 410 F.2d 295 (2d Cir. 1969); Price v. Lucky Stores,Inc., 501 F.2d 1177 (9th Cir. 1974).

In City of New York v. International Pipe & Ceramics Corp., supra, this Court, after a brief discussion of the benefits and drawbacks of allowing one lawsuit instead of many, stated that:

> "In resolving these countervailing situations, the judgment of the trial judge should be given the greatest respect and the broadest discretion, particularly if, as here, he has canvassed the factual aspects of the litigation" (410 F.2d at 298),

and that

> "In final analysis, resolution of the question now presented reverts to the 'fair and efficient adjudication' problem. The trial judge will have to face this problem in a realistic way. He should be afforded the greatest latitude in the exercise of his judgment after a careful factual exploration as to how this result can be attained" (410 F.2d at 300).

In the case at bar, the District Court granted class certification for a class defined as all purchasers of Javelin stock during the period April 30, 1969 to October 25, 1973,

the period of the alleged market inflation by defendants. The District Court had before it the affidavit of class counsel and, on the basis of the presentation made therein, concluded that the requirements of Rule 23(a) and (b)(3) were met. Both plaintiffs are clearly members of the class since they purchased during the class period and come within the class definition of "all purchasers during the period April 30, 1969 to October 25, 1973." The moving affidavit of Robert M. Kornreich (A 84-91) indicated that there was a common plan and scheme and course of conduct to inflate the market price of Javelin stock and thus presented a classic case for class action treatment. See Blackie v. Barrack, 524 F.2d 891, 902 (9th Cir. 1975), which cites cases from many jurisdictions.

On the question of representation, we feel it advisable to quote appellant rather than try to make sense of his argument. He says, "this action with respect to the first class period must be dismissed because plaintiff Bonime has failed to demonstrate that she has suffered any injury." (Appellant's Br. 12). Appellant does not explain how an objector has standing to move to dismiss part of the complaint either on appeal or in the District Court, and he confuses the right of a class representative to commence and prosecute an action on behalf of the class and the right thereafter to participate in the proceeds of the settlement.

Aside from the fact that plaintiff Olden's status is not seriously challenged*, Sloan also disregards the numerous authorities which recognize that the class certification question is to be judged at the time certification is to be made and does not depend on whether the plaintiff is untimately able to prove the merits of his individual claim or his entitlement to relief. Sosna v. Iowa, 419 U.S. 393 (1975); Frost v. Weinberger, 515 F.2d 57 (2d Cir. 1975); Parham v. Southwestern Bell Telephone Co., 433 F.2d 421 (8th Cir. 1970); Huff v. N.D. Cass Company of Alabama, 485 F.2d 710 (5th Cir. 1973); Dorfman v. First Boston Corporation, 62 FRD 466 (1974); Cf. Eisen v. Carlyle & Jacquelin, 417 U.S. 156, (1974).

The applicable principles are well stated in Dorfman v. First Boston Corporation, supra, as follows:

> "One may be a member of a class in an action for damages even though he may ultimately be unable to prove any monetary loss. To read an allegation of damages in the complaint as restricting class membership to individuals who can prove their actual damages at the time the class is formed would frustrate the limited purposes of Rule 23. It would mean that before deciding a Rule 23 motion in an action for damages, a court would invariably have to determine whether the putative class representative had himself suffered damages. In other words, an allegation of damages in the complaint would in effect transform a class action motion into a

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* While appellant claims to have inspected the Proof of Claim filed by Gertrude J. Bonime (Appellant's Br. 12), he conveniently did not find the Proof of Claim of Lillian Olden which is also on file, and shows a loss under the settlement formula.

motion for summary judgment as to the representative plaintiff's damages. In Mersay v. First Republic Corp. of America, 43 F.R.D. 465 (S.D.N.Y. 1968), a 10b-5 case, the defendants opposed the class action motion in part on the grounds that the representative plaintiff would be able to prove neither reliance nor damages and, therefore, his claims would not be typical of those of the class. The court refused to pass on those questions, stating:

> 'This contention goes to individual substantive disputes that should await trial. [Citation omitted]. If Mersay were required to prove his own reliance or damages at this stage, it would follow that no class action could stand until the plaintiff proved every material element of his individual claim. Clearly, such a procedure was not envisioned under Rule 23,' 43 F.R.D. at 469.

We agree" (62 FRD at 472)

Based upon the foregoing authorities, plaintiffs clearly are proper class representatives and the fact that one of the plaintiffs accepted a settlement in which she might not be able to participate shows only that she was indeed able to represent the class properly.

The line of authority represented by Leonard v. Merrill Lynch, et al. 64 FRD 432 (S.D.N.Y. 1974), relied upon by appellant, is completely inapplicable. In that case, the moving

defendants claimed that the action was improperly commenced against them by plaintiffs, and that they were entitled to summary judgment. The court agreed that said defendants were entitled to summary judgment, and that a class could not be certified against such defendants. By contrast, in the instant case, defendants did not seek summary judgment at the time of class certification or at any time thereafter.

POINT FIVE

THE NOTICE WHICH WAS APPROVED BY THE DISTRICT COURT MET THE REQUIREMENTS OF RULE 23 OF THE FEDERAL RULES OF CIVIL PROCEDURE AND DUE PROCESS OF LAW

While appellant contends that the Notice did not meet the requirements of Rule 23(e) of the FRCP and due process in notifying class members of the proposed settlement, an examination of the Notice in the light of the principles applicable thereto demonstrates that it is clearly sufficient.

The criteria governing the adequacy of the contents of a settlement notice have been set forth in detail in Grunin v. International House of Pancakes, supra. The Court stated:

> "As a general rule,the contents of a settlement notice must 'fairly apprise the prospective members of the class of the terms of the proposed settlement and of the options that are open to them in connection with [the] proceedings' [Citations omitted]. In addition, the notice

> on its face must be 'scrupulously neutral' and emphasizes that the court is expressing no opinion on the merits of the case or the amount of the settlement. [Citations omitted.] In effectuating this neutral apprisal the notice may consist of a very general description of the proposed settlement, including a summary of the monetary or other benefits that the class would receive and an estimation of attorneys' fees and other expenses." (513 F.2d at 122.)

The instant Notice meets the criteria set forth in Grunin. The Notice gives a neutral description of the case, a description of the terms of the proposed settlement as set forth in the Stipulation of Settlement and a description of the persons entitled to participate therein. It informs the class members of their right to object, opt out or accept the settlement, and the amount that will be sought by plaintiffs' counsel as fees. The Notice also informs the members of the class about other related litigation and that the method for review of the Proof of Claim was set forth in the Stipulation of Settlement. Claimants are informed that in the event of rejection of a claim after such review by any of the attorneys for the parties a final determination will be made by the Court or by a Master appointed by the Court.

Appellant attacks the Notice because it did not estimate the per-share recovery that a class member may receive. (Appellants' Br. p. 30.) It is obvious that such information could not have been given since it would be

impossible to know at the time the Notice is sent out the total amount of claims which would ultimately be filed. Under the Stipulation of Settlement, the settlement fund is to be allocated between two groups and then distributed proportionately to the members of the class who file claims (A 20). If total claims exceed the amount of the fund, then each member's share is reduced pro rata. Until all claims are filed and challenged claims are passed upon by the Court, it would be utterly impossible to estimate how much each class member will receive (per share) as his share of the settlement.*

Appellant also contends that the Notice was not sufficiently detailed and did not set forth the formulas utilized in the settlement to determine each class member's loss for purpose of distributing the settlement. We submit that the fact that the Notice did not fully set forth all relevant provisions of the Stipulation of Settlement did not render the Notice misleading or inadequate. In this Notice, the class was advised that the Notice constituted a brief summary of the settlement and that the settlement agreement as well as all other pleadings and papers were on file and could be examined at this Courthouse. The Court in Grunin, in rejecting an argument similar to Sloan's, noted that:

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* Appellant himself appears to recognize the difficulty of estimating the amount to be received by each claimant (Appellant's Br. pp. 30-31).

> "Class members are not expected to rely upon the notice as a complete source of settlement information. [Citation omitted]. Any ambiguities regarding the substantive aspects of the settlement could be cleared up by obtaining a copy of the agreement as provided for in the first paragraph of the Notice. In effect, appellant is suggesting that a copy of the agreement must be included with the Notice in order to satisfy due process standards. We have found no basis for such a requirement". (513 F.2d at p. 114)

In State of West Virginia v. Chas. Pfizer & Co., supra, this Court rejected a similar argument that the Notice of a hearing on the question of approval of the settlement was inadequate where it failed to mention the settlement plan of allocation with respect to an important subclass. This Court stated that the argument was "erroneous since the notice clearly referred to the plan and invited any interested party to inspect it at the clerk's office." 440 F.2d at 1091.

We submit that since all class members received sufficient information about the basic facts of the class determination and the proposed settlement and were informed by the Notice that they could obtain further information if they so desired by examining the original documents which were at all times on file with the court, the requirements of Rule 23 and due process were met.

POINT SIX

THE PROVISION OF THE ORDER AND FINAL JUDGMENT BARRING AND ENJOINING THE INSTITUTION AND PROSECUTION OF ANY DIRECT OR REPRESENTATIVE ACTION ARISING OUT OF THE MATTERS ALLEGED IN THE AMENDED COMPLAINT WAS PROPER

Appellant's argument about the overbreadth of the Order and Final Judgment rests on a misconception about its injunctive language.

He argues that this Order and Final Judgment will bar claims which are not included herein and which might in the future be asserted by a stockholder representatively or derivatively on behalf of Javelin. The Order and Final Judgment does not contain any provision barring the assertion of such claims. The Order only bars future individual or representative (not derivative) suits brought by a stockholder based on claims which are similar to or arise from the matters alleged. It does not purport to bar an individual or representative action based on conduct not involved in this action, nor a derivative action of any kind. Furthermore, there is no provision in the Stipulation of Settlement providing that Javelin will execute any release of any claim against the individual defendants. Thus, the instant case is completely unlike Herbst v. I.T. & T., CCH Fed. Sec. L. Rep. ¶95,696 (D. Conn. 1976) on which Sloan heavily relies.

POINT SEVEN

THE DISTRICT COURT ACTED PROPERLY IN ENTERING AN ORDER AND FINAL JUDGMENT APPROVING THE SETTLEMENT, DISMISSING THE ACTION WITH PREJUDICE AND RESERVING JURISDICTION OVER THE ADMINISTRATION OF THE SETTLEMENT (INCLUDING THE DETERMINATION OF DISPUTED PROOFS OF CLAIM AND OVER THE APPLICATION OF PLAINTIFFS' COUNSEL FOR ATTORNEYS FEES)

The procedure followed by the District Court in entering the Order and Final Judgment approving the settlement and dismissing the action and reserving jurisdiction over effectuation of the settlement and the application for counsel fees is a procedure regularly followed by district judges in cases of this kind. State of West Virginia v. Chas. Pfizer & Co., 314 F. Supp. 710, 748 (S.D.N.Y. 1970) aff'd., State of West Virginia v. Chas. Pfizer & Co., supra; City of Detroit v. Grinnell Corporation, 68 Civ. 4026 (Final Judgment entered January 23, 1973) aff'd. City of Detroit v. Grinnell Corporation, supra. See Benzoni v. Greve, CCH Fed. Sec. L. Rep. ¶94,912, (S.D.N.Y. 1974); In re National Student Marketing Litigation CCH Fed. Sec. L. Rep. ¶94,609 (D. Col. 1974).

This Court has recently considered appeals from final judgments similar to the instant Order and Final Judgment and sustained the lower courts. See State of West Virginia v. Chas. Pfizer & Co., supra; City of Detroit v. Grinnell

Corporation, supra. Appellate courts have similarly heard appeals in cases where the lower court reserved jurisdiction to make further orders which, like the instant case, do not affect the finality of the judgment, and found such orders appealable. See Kasishke v. Baker, 144 F.2d 384 (10th Cir. 1944); Durkin v. Mason & Dixon Lines, 202 F.2d 425 (6th Cir. 1953); Baughman v. Cooper-Jarrett,Inc. 305 F.2d 529, 531 fn. 2 (3d Cir. 1976).

In the present case, it would be extremely burdensome and wasteful of the time and effort of the parties and the court to process the claims, to hold hearings with respect to disputed claims, and consider and pass upon an application for attorneys fees before knowing with certainty whether the settlement approval will be sustained on appeal. Thus, we submit that the Order and Final Judgment was properly entered and should be affirmed by this Court on this appeal.

CONCLUSION

For the reasons stated herein, this Court should affirm in all respects the Order and Final Judgment of the District Court approving the settlement.

Dated: New York, N.Y.
March 1, 1977

Respectfully submitted

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AFFIDAVIT OF SERVICE BY MAIL

State of New York,
City of New York,
County of New York, ss.:

ALFRED BUSH, JR., being duly sworn, desposes and says that he is over 18 years of age. That on the 1st day of March, 1977, he served 2 copies of Brief on Behalf of Plaintiffs-Appellees upon:

MOSES KRISLOVE
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By depositing 2 copies of the same securely enclosed in a post-paid wrapper in a branch depository maintained and exclusively controlled by the United States Post Office at Canal & Church Streets, N.Y.C., addressed to said attorney's for the above named, that being the address within the state designated by them for that purpose upon the preceding papers as the place where they regularly kept office and at which place they regularly received mail.

Sworn to before me this
1st day of March, 1977

Sylvia Morris

SYLVIA MORRIS
Notary Public, State of New York
No. 31-4526651
Qualified in New York County
Commission Expires March 30, 1978

Alfred L. Bush Jr.
ALFRED BUSH, JR.

Service of 2 copies of this within
Brief admitted this
March 1972
for Appellee Canadian Javelin Ltd

Atty for Respondent John C. Doyle Esq.

Service of 2 copies of this within
brief is admitted this 2nd day of
March 1972.